

(#25)

COMMONWEALTH OF MASSACHUSETTS

BRISTOL, ss.

SUPERIOR COURT  
CIVIL ACTION  
NO. 08-1337-A

DAVID DEOLIVEIRA

vs.

CIVIL SERVICE COMMISSION OF MASSACHUSETTS & others<sup>1/</sup>

MEMORANDUM OF DECISION AND ORDER ON  
CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS

The plaintiff, David DeOliveira ("DeOliveira"), seeks review, pursuant to G. L. c. 30A, § 14 and G. L. c. 31, § 44, of a decision by the Civil Service Commission ("Commission") which dismissed DeOliveira's appeal of a decision by the Taunton Municipal Council ("Appointing Authority") imposing an eighteen month suspension on DeOliveira from his duties as a police officer.

This matter is before the court on DeOliveira's and the City of Taunton's ("City") cross-motions for judgment on the pleadings. DeOliveira alleges that the Commission's decision unfairly left in place the Appointing Authority's inequitable and disparate treatment of Sgt. Kevin Medas ("Sgt. Medas") and DeOliveira. DeOliveira also alleges that the Commission misapplied the law of self-defense and made erroneous findings of fact to support its decision. The City's cross-motion for judgement on the pleadings claims that the application of the law of self-defense was unnecessary and that any misstatements in the Commission's findings of fact were minor and immaterial to the ultimate finding that DeOliveira's conduct violated the Rules and Regulation of the Taunton Police Department.

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<sup>1/</sup> Christopher Bowman, in his capacity as Chairman and Commissioner of the Civil Service Commission, and the City of Taunton.

Following a hearing on January 19, 2010, and review of the administrative record, DeOliveira's motion for judgment on the pleadings is **DENIED** and the City's motion is **ALLOWED**.

### **BACKGROUND**

A review of the Administrative Record reveals the following:

DeOliveira is a tenured civil service employee of the City, and has been employed as a police officer with the Taunton Police Department since 1997. Sgt. Medas has been employed by the Taunton Police Department since 1984. DeOliveira and Sgt. Medas developed a friendship as teenagers over twenty years ago, prior to DeOliveira becoming a Taunton police officer. In 1997, Sgt. Medas, then unmarried, dated DeOliveira's former girlfriend, Carol Travis ("Travis"). In 1998, Sgt. Medas married Kerri Wilkerson (now known as "Kerri Medas") and the couple subsequently had two children together. DeOliveira continued to have an "on-again, off-again" relationship with Travis from 1994 to 2001. They never married, but they had a son, who was born in 2001.

In early November 2003, Kerri Medas filed for divorce from Sgt. Medas, though the two continued to live together in the family home until June 2004. In December 2003, DeOliveira began dating Kerri Medas. The romantic relationship between DeOliveira and Sgt. Medas's now ex-wife lasted until October 2004. In January 2004, Sgt. Medas began dating Travis, DeOliveira's former girlfriend.

On March 15, 2004, at approximately 5:00 p.m., DeOliveira concluded visitation with his son and dropped him off at Travis's place of employment in Taunton. As Travis left work, DeOliveira proceeded a few cars behind her. DeOliveira planned to go to the police station to

drop off a detail slip. During this time, Travis and Sgt. Medas spoke via Nextel about going to the CVS Pharmacy ("CVS") in the Hart's Four Corners area of Taunton.

Travis stopped her vehicle at a traffic light at the intersection of County Street and Hart Street. Travis planned on turning left onto County Street and then turning right into the CVS parking lot. Sgt. Medas was two vehicles behind Travis and planned to follow her to the CVS.. While the vehicles were stopped at the traffic light, DeOliveira pulled up beside Sgt. Medas and the two men engaged in a verbal altercation that was contentious and laced with vulgarities. Sometime during the verbal exchange at the traffic light, Sgt. Medas called the Chief of Police, Raymond O'Berg ("Chief O'Berg") via Nextel to report the encounter. Chief O'Berg replied via Nextel and ordered Sgt. Medas to go to the police station and write an official report concerning the incident at the traffic light. Sgt. Medas disregarded this order and proceeded to the CVS at Hart's Four Corner.

When the light turned green, DeOliveira continued straight through the intersection and parked in the driveway of a house, which belongs to his friend, John-Paul Thomas ("Thomas"), at the corner of County Street and Hart Street. DeOliveira testified that he knocked on the front door and after nobody answered the door, he walked across the street to get something to eat or drink from the Dunkin Donuts or Classic Pizza. DeOliveira testified that he then proceeded to the CVS where he saw Sgt. Medas's Ford Expedition parked in front of the store. DeOliveira acknowledged that he waited outside the CVS for Sgt. Medas to exit the store.

Sgt. Medas and Travis eventually exited the CVS and walked to their own vehicles. DeOliveira followed Sgt. Medas to his vehicle in the CVS parking lot. Sgt. Medas entered his vehicle and shut the door. DeOliveira motioned for Sgt. Medas to roll down the window and

then the two men exchanged words. Sgt. Medas then rolled up his window and, for the second time that day, called Chief O'Berg, who instructed Sgt. Medas to go to the police station. Sgt. Medas then slightly opened the door of his vehicle so that Chief O'Berg could hear DeOliveira through the Nextel phone.

DeOliveira then opened the vehicle door and started punching Sgt. Medas in the head and face while Sgt. Medas was still in his vehicle. DeOliveira then pulled Sgt. Medas out of the vehicle by his shirt collar, causing Sgt. Medas to fall on the ground. DeOliveira then positioned himself above Sgt. Medas and delivered another series of punches. DeOliveira then kicked Sgt. Medas and Sgt. Medas grabbed DeOliveira's leg to prevent him from kicking again. DeOliveira claimed that he acted in self-defense and only struck Sgt. Medas after Sgt. Medas struck DeOliveira in the arm when opening the door to his vehicle.

The altercation continued and Sgt. Medas was grabbed by two men, identified as Owen Tirrell and DeOliveira's friend, Thomas. Both men held Sgt. Medas by an arm and neither restrained DeOliveira. Officer Michael Morais was the first police officer to arrive on the scene after having received a radio call to report to the CVS parking lot at Hart's Four Corner. After the altercation, Sgt. Medas was taken by ambulance to Morton Hospital. Sgt. Medas sustained injuries to his head, face and chest, as well as fractures to his ribs.

After the initial investigation regarding this altercation, DeOliveira was charged by the Appointing Authority with the following violations of the Rules and Regulations of the Taunton Police Department:

**Required Conduct:**

24. Personal Relationships - All officers shall be considerate and polite at all times to all department personnel and maintain good relationships with their superiors and their fellow officers in the spirit of mutual concern for their common objective.

Prohibited Conduct:

1. Conduct unbecoming of an officer - The commission of any specific act or acts of immoral, improper, disorderly, or intemperate personal conduct which reflects discredit upon the officer himself, upon his fellow officers or upon the Police Department.

6. Discourtesy - Being rude, impolite, contemptuous or insolent to an officer of rank, to a fellow officer or to a member of the public.

Following the investigation, the Appointing Authority held a disciplinary hearing on April 26, 2004 for DeOliveira and Sgt. Medas.<sup>2</sup> At the hearing, Chief O'Berg recommended that DeOliveira be suspended for eighteen months without pay and also that he receive counseling on anger management and personal relationships. Chief O'Berg recommended the eighteen month suspension for DeOliveira because he was the instigator of this incident, but Chief O'Berg did not believe it was an offense requiring termination. The Appointing Authority imposed an eighteen month suspension on DeOliveira and required him to attend anger management classes and psychological counseling at his own expense. Prior to returning to duty, DeOliveira was required to receive a certificate from a licensed psychologist or psychiatrist certifying that he was fit to perform the duties of a police officer. He was also notified that any further disciplinary infractions or violations of department rules, regulations or policies would result in his immediate termination.

Chief O'Berg recommended that Sgt. Medas receive a letter of reprimand with a copy to be placed in his personnel file, based on Sgt. Medas disobeying Chief O'Berg's directive to return directly to the police station.

The Appointing Authority demoted Sgt. Medas, but the demotion was later rescinded and a

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<sup>2</sup> Sgt. Medas was charged with the same offenses as DeOliveira and an additional charge of Insubordination - Failure or deliberate refusal to obey a lawful order given or issued by an officer of rank.

warning letter was placed in his personnel file as part of a settlement agreement reached by the parties after Sgt. Medas appealed the demotion to an arbitrator.

On May 5, 2004, DeOliveira appealed the decision of the Appointing Authority to the Commission. The disposition of the civil service appeal was delayed while DeOliveira faced criminal charges related to this incident. DeOliveira was tried in the Taunton District Court in May 2007 on criminal charges of Assault and Battery with a Dangerous Weapon, and Assault and Battery. The jury found him not guilty on both counts.

The Commission held hearings on this matter on April 16, 2008, May 18, 2008 and June 6, 2008. On September 4, 2008, the Commission voted to dismiss DeOliveira's appeal because the Commission found that DeOliveira was clearly the aggressor and that a modification of his penalty was not warranted. DeOliveira filed his complaint on October 7, 2008 appealing the Commission's decision.

### **DISCUSSION**

General Laws c. 30A, § 14 grants any person or entity aggrieved by a decision of any agency in an adjudicatory proceeding the right to appeal that decision to the Superior Court. Unless irregularities in the procedure before the agency are alleged, a court's review of an agency decision is confined to the administrative record. G. L. c. 30A, § 14(5). The appellant bears the burden of demonstrating the decision's invalidity. Merisme v. Board of Appeals on Motor Vehicle Liab. Policies & Bonds, 27 Mass. App. Ct. 470, 474 (1989).

This court may reverse or modify the agency decision only "if it determines that the substantial rights of any party may have been prejudiced" because, among other reasons not applicable here, the decision is "unsupported by substantial evidence," or is "arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law." G. L. c. 30A, §

14(7). “Substantial evidence is ‘such evidence as a reasonable mind might accept as adequate to support a conclusion,’ taking ‘into account whatever in the record detracts from its weight.’”

Lycurgus v. Director of Div. of Employment Sec., 391 Mass. 623, 627-628 (1984) (citations omitted). See G. L. c. 30A, § 1(6). “When determining whether an agency decision is supported by substantial evidence, the standard of review is ‘highly deferential’ to the agency.” Connolly v. Suffolk County Sheriff’s Dep’t, 62 Mass. App. Ct. 187, 193 (2004), citing Hotchkiss v. State Racing Comm’n, 45 Mass. App. Ct. 684, 695 (1998).

This court is required to “give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it.” G. L. c. 30A, § 14(7). “If [an] agency has, in the discretionary exercise of its expertise, made a ‘choice between two fairly conflicting views,’ and its selection reflects reasonable evidence, [a] court may not displace [the agency’s] choice . . . even though the court would justifiably have made a different choice had the matter been before it de novo.” Lisbon v. Contributory Retirement Appeal Bd., 41 Mass. App. Ct. 246, 257 (1996) (citations omitted).

#### I. Commission’s Decision to Dismiss DeOliveira’s Appeal

DeOliveira argues that the Commission’s decision to dismiss his appeal was arbitrary and capricious because it left in place the unfair, inequitable and disparate treatment that DeOliveira received from the Appointing Authority for his actions in the off-duty physical altercation between himself and Sgt. Medas.

If the Commission finds by a preponderance of the evidence that there was just cause for an action taken against a person aggrieved, the Commission shall affirm the action of the Appointing Authority. G. L. c. 31, § 43; Falmouth v. Civil Serv. Comm’n, 61 Mass. App. Ct. 796, 800 (2004). “The issue for the commission is ‘not whether it would have acted as the

appointing authority had acted, but whether, on the facts found by the commission, there was reasonable justification for the action taken by the appointing authority in the circumstances found by the commission to have existed when the appointing authority made its decision.” Id., quoting Watertown v. Arria, 16 Mass. App. Ct. 331, 334 (1983).

Although the Commission has the power to modify the penalty imposed by the Appointing Authority, “the commission may not modify a penalty without providing a reasoned explanation for doing so.” Police Comm’r of Boston v. Civil Serv. Comm’n., 39 Mass. App. Ct. 594, 600 (1996) (“power to modify penalties permits the furtherance of uniformity and the equitable treatment of similarly situated individuals. It must be used to further, and not to frustrate, the purpose of civil service legislation”). It is appropriate for the Commission to intervene and modify the penalty imposed by the Appointing Authority where the Commission finds political or biased decision-making or inequitable treatment of similarly situated individuals. Falmouth, 61 Mass. App. Ct. at 800-801.

Here, the Commission determined that DeOliveira was clearly the aggressor. In making its determination, the Commission found that it was improbable that DeOliveira’s visit to CVS after a heated exchange at a traffic light was a coincidence. The Commission found that it was more plausible that DeOliveira intended to continue the confrontation that had occurred only moments earlier. DeOliveira acknowledged that he waited outside the CVS for Sgt. Medas to exit the store, and then followed Sgt. Medas to his car in the CVS parking lot. Although Sgt. Medas entered his vehicle, DeOliveira approached the driver side of Sgt. Medas’s vehicle and the two men exchanged words.

Further, the Commission found that DeOliveira pulled the vehicle door open started punching Sgt. Medas in the head and face while Sgt. Medas was still in his vehicle. The



Commission also found that DeOliveira then pulled Sgt. Medas out of the vehicle and onto the ground, continued to punch him and kicked him while he was on the ground.

Since the Commission found that DeOliveira was the aggressor, DeOliveira and Sgt. Medas were no longer similarly situated individuals. The Court cannot find that the Commission was required to modify the penalty imposed by the Appointing Authority where the Commission did not find that the inequitable treatment occurred as a result of political considerations, favoritism, or bias.

## II. Application of the Law of Self-Defense

DeOliveira also argues that the Commission erroneously applied the law of self-defense. In its cross-motion, the City maintains that self-defense findings were neither required nor appropriate because the Commission's proceedings were not criminal in nature.

A person may lawfully use reasonable force to defend himself from physical attack. Commonwealth v. Barnacle, 134 Mass. 215, 215 (1883). A person may not use force to defend himself until he has availed himself of all proper means to avoid physical combat. Commonwealth v. Harrington, 379 Mass. 446, 450 (1980); Commonwealth v. DeCaro, 359 Mass. 388, 390 (1971) (duty to retreat rule applies equally when deadly or non deadly force is used in self-defense). Generally, one who provokes or initiates an assault may not lawfully defend himself with force, unless he withdraws from the conflict in good faith and announces his intention to withdraw. Commonwealth v. Naylor, 407 Mass. 333, 335 (1990). In civil actions, the party asserting that he acted in self-defense has the burden of proving the affirmative defense. Gillespie v. Bopp, 225 Mass. 534 (1917).

Here, the Commission found that DeOliveira did not have the right of self-defense because it found that DeOliveira had been the initial aggressor and that he could have walked

away any time prior to striking Sgt. Medas. The Commission determined that DeOliveira's testimony that he was struck in the arm by the door of Sgt. Medas's vehicle, was not credible.. Furthermore, the Commission concluded that even if DeOliveira's testimony was truthful, he had multiple opportunities to retreat or disengage from the confrontation with Sgt. Medas before resorting to force. The Commission correctly therefore found that DeOliveira had not met his burden of proving that he acted in self-defense since he was the initial aggressor and did not retreat prior to resorting to the use of force.

### III. Commission's Erroneous Findings of Fact

Finally, DeOliveira contends that the Commission erred with respect to Findings of Fact # 47 and # 49. Findings of Fact # 47 indicates that Sgt. Medas testified that he had been kicked in the head and chest. However, Sgt. Medas only testified that he was kicked in the head. Findings of Fact # 49 states that Travis testified that she witnessed DeOliveira kicking Sgt. Medas. However, Travis' testimony was that she did not see any kicking. DeOliveira contends that the weight of all the other evidence does not support a conclusion that DeOliveira kicked Sgt. Medas.

Although the Commission erred in its finding that Travis witnessed DeOliveira kicking Sgt. Medas, the Commission had adequate evidence to support the finding that DeOliveira kicked Sgt. Medas.<sup>3</sup> Furthermore, the record indicates that DeOliveira repeatedly punched Sgt. Medas. Therefore, the Commission had substantial evidence to support its conclusion that DeOliveira engaged in an off-duty physical altercation and that the Appointing Authority had

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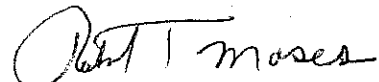
<sup>3</sup> In addition to Sgt. Medas's testimony before the Commission that he was kicked in the head, the administrative record also includes a statement by Sgt. Medas given to Lieutenant Coelho that he was kicked in the forehead. The administrative record also contains medical records which indicate that Sgt. Medas was kicked. Sgt. Medas also testified before the Appointing Authority and stated that he had been kicked and that his injuries included a red mark on his chest.

reasonable justification to impose penalties on DeOliveira for his violation of the Rules and Regulations of the Taunton Police Department.

The Court concludes that the decision of the Commission is neither arbitrary nor capricious and is supported by substantial evidence.

**ORDER**

For the foregoing reasons, it is hereby **ORDERED** that David DeOliveira's motion for judgment on the pleadings is **DENIED** and that the City's motion is **ALLOWED**. The decision of the Commission dated September 4, 2008 dismissing Plaintiff's appeal is **AFFIRMED**.

A handwritten signature in cursive script, appearing to read "Richard T. Moses".

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Richard T. Moses  
Justice of the Superior Court

DATED: March 16<sup>th</sup>, 2010